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No. 87-133

In The
Supreme Court of the United States
October Term, 1987

MERCILYN BUCHANAN, *et al.*,
Petitioner,

vs.

STANSHIPS, INC., *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATI COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Respondents do not wish to supplement the questions presented for review set out by petitioner; however, respondents believe a clarification is called for. Specifically, petitioner's repeated characterization of the post-judgment motion involved herein as being a "motion to tax allowable costs pursuant to Fed.R.Civ.P. 54(d)" is improper. Respondents' post-judgment motion clearly and properly was styled as a Motion to Alter or Amend Judgment. More importantly, respondents' motion specifically stated it was "asserted pursuant to the provisions of Rule 52 and Rule 59 of the Federal Rules of Civil Procedure."

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STATEMENT OF JURISDICTION

Respondents agree that this Honorable Court has jurisdiction pursuant to 28 U.S.C. § 1254; however, respondents respectfully submit that the questions and issues presented for review do not fall within the parameters set forth in Rule 17.1 of the Rules of the Supreme Court.

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STATEMENT OF THE CASE

This matter involved a DOHSA claim filed by the mother and illegitimate minor son of a Jamaican citizen who stowed away aboard the M/V JAYMAT TRIDENT. After trial and post-trial briefing, a minute entry was rendered indicating that plaintiff's claims against defendants would be dismissed. Further, the minute entry stated that written reasons for the Court's ruling would be assigned, and that final judgment would be entered after filing of the written decision. On January 20, 1987, U.S. District Judge Polozola rendered his written decision setting forth the factual and legal findings which supported dismissal of plaintiff's suit. On January 26, 1987, Judgment was entered against plaintiff and in favor of defendants, dismissing the plaintiff's suit with prejudice. The very next day, January 27, 1987, plaintiff filed Notice of Appeal to the U.S. Court of Appeals for the Fifth Circuit.

On January 29, 1987, defendants timely filed and served their Motion to Alter or Amend Judgment, along with supporting memorandum, pursuant to Rule 52 and Rule 59 of the Federal Rules of Civil Procedure. Specifically, the motion requested that Judge Polozola amend his findings and judgment to award defendants recovery of their costs in an amount to which they legally would be entitled. On January 30, 1987, Judge Polozola granted defendants' motion.

Plaintiff did not file a new Notice of Appeal as required by Rule 4(a)(4) of the Federal Rules of Appellate Procedure. Accordingly, on March 16, 1987, defendants filed their Motion to Dismiss Appeal, which was granted by the Fifth Circuit on April 6, 1987. Thereafter, plaintiff moved the Fifth Circuit for rehearing, which was denied on May 11, 1987.

The Fifth Circuit based its dismissal of plaintiff's appeal on the "bright line" rule it established in *Harcon Barge Co., Inc. v. D&G Boat Rental, Inc., et al.*, 746 F.2d 278 (5th Cir. 1984), *en banc* decision, 784 F.2d 665 (5th Cir. 1986), *cert. denied,* 107 S.Ct. 398, 93 L.Ed.2d 351 (1986). The *Harcon* decision involved issues and arguments identical to those presented herein, and it established a clear and unambiguous rule of decision in the Fifth Circuit—which since has been followed and approved by numerous other circuits.

—o—

SUMMARY OF THE ARGUMENT

Respondents respectfully submit that the Fifth Circuit's dismissal of plaintiff's appeal was well reasoned, well founded and clearly proper. The rule of law established by the Fifth Circuit in *Harcon* eliminates any ambiguity which might arise out of the fact that Rule 59 and Rule 60 of the Federal Rules of Civil Procedure provide overlapping relief. *Harcon* established a clear "bright line" rule which has been followed and cited with approval by numerous other circuits.

This Honorable Court was confronted with a petition for writ of certiorari in *Harcon* which involved issues and arguments virtually identical to those urged by petitioner herein. This Honorable Court denied the petition for writ of certiorari in *Harcon,* and respondents respectfully submit the instant petition similarly should be denied.

—o—

ARGUMENT

In dismissing plaintiff's appeal, the Fifth Circuit relied upon the "bright line" rule it established in the panel and *en banc Harcon* decisions. *Harcon* dealt with the same issues presented in the instant litigation, and the plaintiff in *Harcon* made precisely the same argument as petitioner herein.

In *Harcon,* one of the defendants filed a timely Motion to Amend Judgment, seeking to have the trial court's judgment amended to reflect that it was not liable for costs. The plaintiff in *Harcon* had filed a Notice of Appeal prior to the filing of the defendant's Motion to Amend Judgment, and filed no new notice of appeal after the trial court ruled on the defendant's motion. Accordingly, the defendant moved to dismiss plaintiff's appeal under Rule 4(a)(4) of the Federal Rules of Civil Procedure, and that motion was granted by the Fifth Circuit. Plaintiff petitioned for rehearing *en banc,* and rehearing was granted. It was on rehearing that the Fifth Circuit established its "bright line" rule in an effort to clear up the ambiguities created by the "overlapping relief" allowed under Rule 59 and Rule 60 of the Federal Rules of Civil Procedure.

Harcon stated that an appellate court cannot waive the defect of a premature notice under Rule 4(a)(4), and if no new notice of appeal is filed, the Court of Appeals lacks jurisdiction over the matter. The Fifth Circuit cited *Griggs v. Provident Consumer Discount Co.,* 459 U.S. 56, 103 S.Ct. 400, 74 L.Ed.2d. 225 (1982) for establishing what

it characterized as a rather harsh jurisdictional rule. However, the Court also praised the *Griggs* decision for establishing a "bright line test" which signals lawyers to when a new notice of appeal should be filed. The *Harcon* court stated that the virtue of the clear *Griggs* decision "can be turned to vice" if an equally clear rule is not established to tell lawyers what motions should be considered as triggering the need for a new notice of appeal. The Fifth Circuit carved out a clear rule and compliment to the *Griggs* decision in *Harcon.*

In discussing Rule 59 and Rule 60, the Fifth Circuit in *Harcon* stated as follows:

> It is patent that Rule 59(e) and Rule 60 provide overlapping relief. Motions under Rule 59(e) must be filed and served within ten days, but those listed in Rule 60(a) and (b) may be filed at a later date. When the timeliness not of the motion itself but of a notice of appeal from a judgment is involved, a court is not, however, free to choose under which rule it prefers to consider the motion made. If a motion falls within the scope of Rule 59(e), and it is timely served within ten days after entry of judgment as that rule requires, then the Court must consider it as a Rule 59(e) motion for the purposes of Fed.R.App.P. 4(a)(4), regardless of how it is styled. *Id.* at page 668.

The Court also qualified the aforementioned rule by stating that it should not be applied to motions seeking to correct purely clerical errors and mistakes under Rule 60(a). However, the Fifth Circuit noted that the scope of Rule 60(a) is very limited. *Id.* at page 668. The Court in *Harcon* properly found that the defendant's motion to amend the judgment to correct an award of costs was not a Rule 60(a) motion, even though the defendant specifically did not state in its motion that it was seeking Rule 59 relief. In citing Professor Moore on Procedure, the Court in *Harcon* noted that:

> . . . any motion that draws into question the correctness of a judgment is functionally a motion under Rule 59(e), whatever its label. *Id.* at page 669.

This was the clear and unambiguous state of the law in the Fifth Circuit when the petitioner herein filed her Notice of Appeal to the Fifth Circuit. Respondents' motion sought to alter or amend the Judgment of the trial court, and if necessary, the trial court's reasons for judgment. Respondents' motion specifically stated that it was being brought pursuant to Rule 52 and Rule 59 of the Federal Rules of Civil Procedure. The motion was timely filed within ten days of the trial court's Judgment, and there can be no question that it sought relief which would bring this matter within the purview of Rule 4(a)(4) of the Federal Rules of Civil Procedure. In *Harcon,* confusion initially was created because the defendant did not state that it was bringing its motion pursuant to Rule 59; however, in the instant matter the respondents specifically stated they were seeking relief under Rule 52 and Rule 59.

Respondents brought their Motion to Alter or Amend Judgment under Rules 52 and 59 because it appeared that Judge Polozola had exercised his discretion in denying an award of costs. This was not a motion to correct a purely clerical error; rather, it sought to change a presumed error in the substantive judgment of the Court.

As stated by the late Judge Tate in the original panel opinion in *Harcon,* this motion ". . . looks and reads like and *is* a Rule 59(e) motion. . . ." *Harcon,* 746 F.2d 278 (5th Cir. 1984).

The authorities cited by petitioner suggest that the respondents' motion may also have been assertable under some rule other than Rule 59; however, those decisions are inapposite, for exclusivity is certainly not the hallmark of the relief available under Rules 59 and 60. The appropriate inquiry, then, is whether the motion falls within the scope of Rule 59. The Fifth Circuit in *Harcon,* and in the instant litigation, has stated without hesitation that such a motion indeed seeks Rule 59 relief.

The *Harcon* decision and the bright line rule established by it has been followed and cited with approval in numerous other circuits. See *Sheldon v. Unit Rig and Equipment Co.,* 797 F.2d 883 (10th Cir. 1986); *United States v. Eastern Airlines, Inc.,* 792 F.2d 1562 (11th Cir. 1986); *Rados v. Celotex Corp.,* 809 F.2d 171 (2nd Cir. 1986). In fact, the Seventh Circuit has adopted the rule of *Harcon* as the controlling rule of law in that circuit. *Charles v. Daley,* 799 F.2d 347 (7th Cir. 1986). Since the *Harcon* decision in 1986, no circuit has criticized it or failed to follow its rationale.

CONCLUSION

The "bright line" rule of *Harcon* was established to clear up ambiguities and uncertainties which previously had confronted the appellate practitioner. It sought to establish a rule to end "othewise endless hassles over proper characterization" of post-judgment motions, and it did just that. Petitioner is asking this Honorable Court to muddy the "bright line" of *Harcon.* Petitioner seeks re-

lief not because of any ambiguity created by conflicting jurisprudence or rules of law; rather, she seeks relief because she was not familiar with the controlling rule of law in the Fifth Circuit, she did not read the basis for respondents' Motion to Alter or Amend Judgment, and she did not follow the strict—but clear—provisions of Rule 4(a)(4). This petition and argument is identical to that presented in *Harcon,* and as occurred in *Harcon,* respondents' respectfully submit this Honorable Court should deny the petition for writ of certiorari.

Respectfully submitted,

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